

11-K SEC reporting requirements

Note: The AICPA Employee Benefit Plan Audit Quality Center has prepared this document to provide members with a handy reference for identifying and understanding the various filing requirements for plans that file on Form 11-K with the SEC. It should be used for reference purposes only.

Form S-8 requirements

- Sponsor must register employer stock to be issued pursuant to an employee benefit plan
- Sponsor must register participants' interest in a plan if:
 - Plan is both voluntary and contributory and
 - Not managed by an insurance company (separate account) or a bank (common trust fund) or
 - The plan is a single-employer plan in which employee contributions are invested in employer securities
- Exclusions:
 - Defined benefit plans
 - Defined contribution plans that only involve purchase of employer securities with employer contributions

Form 11-K requirements

- When is Form 11-K Required?
 - For Annual Reports of Employee Stock Purchase, Savings and similar plans, interest in which constitutes securities registered under Securities Act of 1933
 - Existing plan which is adding employer securities as a participant-directed option for employee deferrals
 - New Plan which includes employer securities as a participant-directed option for employee deferrals
- Filing Requirements
 - Due Dates
 - 90 days after the end of the fiscal year of the Plan for plans that are not subject to ERISA or those plans that elect to file under Regulation S-X
 - Plans subject to ERISA that do not elect to file under Regulation S-X, 180 days after the end of the fiscal year of the Plan
 - Extension requirements
 - Under Section 12b-25, filers can request a 15-calendar day filing extension
- Financial Statements and Schedules
 - SEC-Format Section 15(d)
 - See Article 6A of Regulation S-X
 - ERISA Format
 - ERISA Plan Audit required
 - ERISA 103(a)(3)(C) Audit is *not* acceptable
 - If an ERISA 103(a)(3)(C) audit was performed in the prior year, an upgrade of the prior year audit to a full scope audit is required
 - Modified cash basis of accounting *is* acceptable

Exemptions

- From Audited Financial Statements Requirement
 - Less than 100 participants and filing in accordance with ERISA

- Unaudited financial statements would be included in the filing
- Stock-bonus plans that are not ERISA plans are required to be audited under Regulation S-X

Consents

- Consents of Independent Registered Public Accounting Firm
 - Requirement that auditors consent to the use of their report in a 1933 Act registration statement
 - Should be dated as close to the filing date as possible but not earlier than 3-5 days
 - Consents are addressed only to the client
 - Example Consent of Independent Registered Public Accounting Firm:

CONSENT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

We consent to the incorporation by reference in the Registration Statement (No. 333-000XXX) on Form S-8 of XYZ, Inc. of our report dated May 24, 200X, with respect to the statements of net assets available for benefits of XYZ, Inc. 401 (k) Plan as of December 31, 200X, and 200Y, the related statements of changes in net assets available for benefits for the years then ended, and the related supplemental schedules as of December 31, 200X, which report appears in the December 31, 200X annual report on Form 11-K of XYZ, Inc. 401(k) Plan.

/s/ Firm Name
(typed, known as conformed signature)

City, State
Date

- Unique Circumstances
 - Change in Auditors
 - Two consents are needed
 - Impact audit opinions
 - Additional audit procedures required

Form 8-K Requirements

- Change in Auditors
 - Form 8-K not required to be filed for a change in auditor of an 11-K
 - PCAOB “five-day letter” – the requirement of a five-day letter for terminated auditors of an 11-K is not clear. Some firms file the letter while other firms do not.
 - Form 5500 Schedule C requires reporting of changes in auditors and reason for the change.

PCAOB Form AP, Auditor Reporting of Certain Audit Participants

- Requires disclosure of
 - Engagement partner’s name
 - Other accounting firms (participating in the audit)
- Form AP filing deadline – 35 days after the audit report is first included in a document filed with the SEC (generally the release date)

Reference to PCAOB Standards

- PCAOB AS 3101, *Reports on Audited Financial Statements*
 - Title of audit report: *Report of Independent Registered Public Accounting Firm*
 - The auditor’s report must be addressed to the shareholders and the board of directors, or equivalents for companies not organized as corporations. For a benefit plan, the auditor's report would generally be addressed to the plan administrator and plan participants.
 - Must include a statement about how long the firm has served as the plan’s auditor (tenure).

- *Must* refer to standards of the Public Company Accounting Oversight Board (United States) and *cannot* refer to GAAS.
 - SEC will reject filings if the auditor’s report refers to GAAS
 - DOL Regulations *require* reference to GAAS
 - Could reject filings if the *only* reference is to PCAOB standards
 - Thus, two separate opinions are issued and included in separate reports
- Example Wording in Auditor’s Report for 11-K Filing with the SEC:

“We conducted our audits in accordance with standards of the *Public Company Accounting Oversight Board (United States)*. Those standards require that we plan and perform. . . .”

- Example Wording in Auditor’s Report for a Full Scope Audit Filed with the DOL:

“Our responsibility is to express an opinion on these financial statements based on our audits. We conducted our audits in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform....”

Blackout Periods

- Section 306-*Insider Trades During Pension Fund Blackout Periods*
 - Executives *cannot* exercise and cash out their employee stock options and sell other issuer securities acquired through the company’s equity compensation plans during a pension fund blackout period
 - This is a Corporate issue but plan auditors should be aware of the rules
- DOL Blackout Regulations
 - DOL has additional regulations related to blackout periods with penalties for the Plan Sponsor
 - 401(k) Plans must provide 30 day advance notice to participants, and include:
 - Reason for blackout
 - Start and end dates
 - Description of rights being suspended
 - Statement advising participants to evaluate their investments with this in mind
 - Plan Sponsor may be subject to penalties of \$141/day per participant (in 2020)
 - DOL has been reviewing and assessing penalties

Independence

- SEC Office of the Chief Accountant: Application of the Commission’s Rules on Auditor Independence—Frequently Asked Questions
 - [Pre-Approval of Audits of Employee Benefit Plans](#) – Audit committee administration of the engagement section, Question No. 6
 - [Prohibited and Non-Audit Services](#) – Non-audit services section, Question No. 10
- [DOL and AICPA Independence Rule Comparison](#)

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